

Trump's Non-Emergency Emergency, Part II

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On Friday 15 February 2019, Donald Trump declared a state of emergency.

Or maybe not.

In a rambling and sometimes incoherent news conference that wandered off course on multiple occasions, Trump declared that he would use emergency powers to build a wall along the US's southern border. And then he also seemed to say that he [didn't really need the emergency at all](#) and it was all political in any event:

I could do the wall over a longer period of time, I didn't need to do this, but I'd rather do it much faster. And I don't have to do it for the election; I've already done a lot of wall for the election 2020.

Trump evidently declared an emergency just because he wanted to do it. But, as I will show here, the emergency may never come into effect. That doesn't mean that we should think that the constitutional system of the United States is out of danger.

After Trump's news conference, it took nearly all day Friday before the legal infrastructure of Trump's announcement was posted as "a presidential proclamation." This proclamation was accompanied by a "[fact sheet](#)" called "Donald J. Trump's Border Victory" that explained the sources of money for the wall.

The fact sheet asserted that the president had unlocked about \$8 billion for use in wall building. The money came from four places. First, Trump would use the \$1,375 billion that the Congress actually just gave him for "barrier construction."

There is nothing constitutionally problematic about that, because it is a proper appropriation by Congress.

Second, Trump would use "about \$601 million" from the [Treasury Forfeiture Fund](#). This is a fund into which assets are deposited by both the Department of Homeland Security and the Treasury Department as they are confiscated from lawbreakers in the fight against terrorism and criminal enterprises. The purpose of the fund is to increase the ability of these agencies to be effective at fighting crime, and so evidently the president is now arguing that the way to do that is by building a wall.

This is a stretch but, in general, such reallocation of funds have traditionally been made within the executive branch before. No constitutional crisis.

Third, the president would dip into funds allocated to the Department of Defense for drug interdiction. The fact sheet claims that up to \$2.5 billion will come from the DoD, though the total [appropriation for that purpose](#) only seems to add up to \$880 million

across all budget lines (hat tip to Marty Lederman). How the Trump administration arrived at that larger number is anyone's guess.

From a constitutional standpoint, however, drawing from drug interdiction funds of the Defense Department is also relatively unproblematic, since the Congress appropriated the funds with a specific purpose in mind. Arguably, building a wall is one way to prevent drugs from coming into the US. Again, a stretch. But not a constitution-busting grab for power.

After those three sources of funds had been exhausted – and only then – would Trump use funds for which he needed to declare an emergency. Those funds would be unlocked by invoking the emergency provision in [10 USC 2808](#), which allows the president to divert funds from some particular civilian construction projects to others at times of war or emergency. The fact sheet indicated that up to \$3.6 billion will come from this source. The funds from the declaration of emergency would be used last and only after all other sources of funds had been spent. They would also be used only “as needed.”

Trump may never need the funds that required the emergency to access, among other reasons because he has not planned ahead. He has no projects that are “shovel ready” so there is nothing specific on which to spend this new money that he has now earmarked for his wall. It will take some time to figure out where the new wall should go and how it will be constructed. In fact, one objection to Trump's insistence on money for the wall in this last appropriations cycle was that he had no plans that had been vetted in the usual way, so the Congress had no idea what it would be funding. In short, there was nothing concrete, so to speak, to fund.

But a wall will be going up soon anyway. Even before Trump turned his wall into a reason for shutting down the government for 35 days, however, Congress had already appropriated in 2017 and 2018 about \$1.7 billion for barrier construction along the southern border. As of early January 2019, only [about 60% of those funds had actually been awarded](#) in contracts which were just starting to be fulfilled.

Ground is just now being broken for new border barriers – and that construction will continue for some time before the already-appropriated money is spent. So there will be dramatic pictures of a new wall one of these days– but this will not be a wall that has anything to do with the budget battle and invocation of emergency powers that we have just witnessed. It will be the pre-emergency wall.

In fact, it will be some time before any of the money at issue in the recent budget battle would be spent. As the fact sheet tells us, the Trump administration would start by spending the new \$1,375 billion that Congress just last week appropriated for “barriers.” Only after those funds are spent will the administration march through the other three sources in the fact sheet, in that order.

And it only the last source of funds – reallocating the defense budget for civilian construction projects – that would use emergency powers. My guess is that he will never use those funds because he would have to burn through about \$6 billion of other money first, starting from a dead stop because there are no plans in place at the moment to start construction on the post-emergency wall. Given that it has

taken nearly two years for the 2017 appropriation to result in groundbreaking on the pre-emergency wall, one can imagine that Trump's term will end before he gets anywhere close to spending the emergency money. He could have built his wall, then, without closing the government and declaring an emergency. He could have just followed the rules.

So maybe, it's not an emergency, after all?

We might then breathe a sigh of relief and say that, in the end, legality was preserved and the constitution has survived intact. Not so fast. As I write, I am sure that most Americans believe that Trump has done a successful end run around Congress to get his wall and they may well take the coming photo-ops of the new wall that will be constructed soon as evidence that Trump won. The fact that no emergency powers may ever in fact be used doesn't change the optics. If the president can assert without consequence that he has the power to act in defiance of a Congress that has told him no, then the norm that the president must live within a system of checked powers can come unraveled.

As the [sociologist W.I. Thomas](#) famously said, "If men define situations as real, they are real in their consequences." Constitutions, too, become real in the world only when people act as if they are real. Nothing destroys a constitutional order faster than people acting as if it no longer exists. That's the danger we now face.

